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IN THE

Supreme Court of the United States

October Term, 1969.

No. 1375.

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF OF PHILADELPHIA GAS WORKS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED.

When the Federal Power Commission began to regulate the prices charged by independent producers for sales of natural gas in interstate commerce, following this Court's decisions in *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, and *Atlantic Refining Co. v. Public Service Comm.*, 360 U. S. 378, the ordering of substantial price reductions and of substantial refunds resulted. Although this Court had uniformly declared that producer regulation was

required solely in order to protect the consumer, petitioner, an interstate pipeline company serving as middleman between the producer and the local distributor, has claimed for itself (and in effect its stockholders) these substantial refund amounts generated by producer regulation, on the theory that Section 4(e) of the Natural Gas Act deprives the Commission of power to protect the consumer. Therefore, the question presented by this case is:

1. Does Section 4(e) of the Natural Gas Act require the Commission to order the consumer-protective producer refund amounts here at issue paid to an intermediate pipeline (and in effect to its stockholders) and not to the consumer?

COUNTERSTATEMENT OF THE CASE.

The Philadelphia Gas Works Division of UGI Corporation, an intervenor in support of the Commission's order in the Court of Appeals for the Fifth Circuit below and a respondent here, files this Brief in Opposition to a Writ of Certiorari and in support thereof respectfully shows:

A. Nature of the Case.

This Court said, in the well-known *Catco*[1] case:

> "The purpose of the Natural Gas Act was to underwrite just and reasonable rates *to the consumers* of natural gas."
>
> "[L]ong delay . . . would provide a windfall for the [producer] natural gas company with a consequent squall *for the consumers.*" 360 U. S. at 388 (Italics added).

Following and specifically relying on the *Catco* decision, a number of Courts of Appeals in 1960 and 1961, reversed various Commission orders certificating essentially unexamined new sales by producers to pipelines at out-of-line prices.[2] On remand to the Commission these sales were generally settled or otherwise reduced in agreements and Commission orders involving refunds of many millions of dollars. Much of the money at stake in this case was the product of these court remands to the Commission. Therefore, it is especially important in this case to begin with a bit of history in order to understand that the escrowed fund here at issue did not drop from the sky, but is the product of a very spe-

1. *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378.

2. *E.g., UGI v. FPC*, 283 F. 2d 817 (9th Cir. 1960); 287 F. 2d 159 (10th Cir. 1961); 290 F. 2d 133 (5th Cir. 1961); 290 F. 2d 147 (5th Cir. 1961).

cific history in which the consumer protective orders of this Court and the various courts of appeals are directly involved and at stake.

The year 1954 marked the introduction of a significant new element into regulation under the Natural Gas Act—the exercise of jurisdiction over producers.[3] This exercise of jurisdiction was the direct product of the inability of existing regulation to cope with rapidly rising field prices charged by producers and the apparent inability of pipeline purchasers to combat the rise through private bargaining. The exercise of jurisdiction provided a forum and set off a decade and a half of litigation in which the principal antagonists were the producers on the one hand and consumer representatives, such as the Philadelphia Gas Works[4] and the other Eastern intervenors in this case, on the other hand.

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3. *Phillips Petroleum Co. v. Wisconsin,* 347 U. S. 672.

4. The Philadelphia Gas Works is a municipally owned distribution system which supplies natural gas to some 600,000 consumer customers within the City of Philadelphia. The Gas Works is operated for the City of Philadelphia under a management agreement by UGI Corporation (formally The United Gas Improvement Company), a privately owned corporation. Under this agreement UGI runs the Gas Works and performs all services in connection therewith for a fixed, specific and invariable yearly management fee, not based upon profits or earnings. The fixed fee constitutes one of the costs of operating the municipal gas works. Thus, under this arrangement no return over actual cost of operation goes to any private person or interest other than the City of Philadelphia and its consumer citizens, and the distribution of such return is determined from time to time by the City.

In the past PGW has actively participated in natural gas litigation sometimes under the style of The United Gas Improvement Company alone and sometimes, as here, under the style of the Philadelphia Gas Works Division of UGI Corporation.

Texas Eastern is a principal supplier of natural gas to the Philadelphia Gas Works and the Gas Works has participated actively in all litigation before the Commission involving Texas Eastern. In addition the Philadelphia Gas Works, under various names, has been active in all phases of producer regulation and its particular interest in the present proceeding is to see that the consumer-protective fruits of this participation are not dissipated.

The *UGI* cases cited in footnote 2, above, were among the landmarks in this producer-consumer contest. And it was this contest which produced the refund amount here at issue.

B. History.

1. *The First Phase: Prospective Regulation Under § 5(a).* The first phase of regulation under the Natural Gas Act, covering a period roughly from 1939 through 1952, involved the rigorous prosecution of major rate cases under § 5(a) against individual interstate pipeline companies.[5] The standard subject matter of these proceedings was the existing rate structure of a pipeline at the time of the passage of the Act.[6] Almost invariably the Commission ordered substantial prospective reductions in the existing rates of the pipelines investigated. These reduction orders were challenged by the pipelines, usually on the basis of the rate-making theory (*e.g.*, fair value v. original cost) used by the Commission. The orders were all ultimately sustained.

It was customary during this period, however, for the courts of appeals to stay the effectiveness of the § 5(a) orders pending review and to order the difference between existing and reduced rates to be paid into the court's registry. Therefore, when the orders were ultimately affirmed, the courts of appeals found themselves obliged to distribute the fund thus accumulated. Considerable litigation arose out of the proper disposition of these funds. *Central States Electric Co. v. City of Muscatine,* 324 U. S. 138; *FPC v. Interstate Natural Gas Co.,* 336 U. S. 577. During this

5. The Commission also dismissed various rate increase filings under § 4(e), usually within the statutory five month suspension period and without the increased rate going into effect. *E.g., Home Gas Co.,* 2 F. P. C. 402 (1941).

6. Two leading examples are the cases reviewed in *FPC v. Natural Gas Pipeline Co. of America,* 315 U .S. 575, and *FPC v. Hope Natural Gas Co.,* 320 U. S. 591.

period the usual transaction involved a sale by independent producers in the field (then not treated as jurisdictional) to *one* interstate pipeline, whose rates were jurisdictional, for resale to a distributor or industrial customer, also nonjurisdictional. Therefore there existed no "chain" of sales believed to be subject to Commission jurisdiction, and the ordering of refunds from one natural gas company to its immediate nonjurisdictional customers achieved the purpose of the Act. But see *FPC v. Interstate Natural Gas Co., supra.*

2. *Second Phase: Period of Rapidly Rising Producer Prices and Administrative Inaction.* In 1954 this Court held that sales by independent producers to interstate pipelines were indeed subject to the Natural Gas Act. Beginning somewhat before this (roughly coinciding with the end of the Second World War) and continuing until about 1961, there was a period of sharply rising producer field prices, which, despite the 1954 holding, were not subjected to effective regulation under either §§ 4, 5, or 7 of the Act (R. 75-76). One casualty of this rapid rise in field prices was the Commission's earlier program of selective review of pipeline rates under § 5(a). This came about because, as field prices rose, pipelines filed numerous rate increases under § 4(e) to pass along the impact of the increasing cost of purchased gas (R. 75-76). Although these increases were suspended and went into effect subject to refund, the sheer magnitude of the amounts involved, coupled with the burden of producer regulation, brought pipeline regulation under §§ 4 and 5 to a standstill as a practical matter. These various pipeline rate increases remained for all practical purposes unresolvable, because the principal cost on which they were based—producer rates—remained a contingent and unresolved matter.

The principal regulatory problem during the period 1954-1961 was the Commission's attempt to evolve a tech-

nique for the regulation of producer prices—first under §§ 4 and 5, and then under § 7. The history of individual company producer regulation and its abandonment because of ineffectiveness need not be detailed. But the most serious results of this regulatory uncertainty were the enormous delays—ultimately concluded in most cases by settlement. Hearings on producer rate increases were measured not in terms of five months (as originally contemplated by Congress) but of years. The serious impact of these delays was compounded where, as in the case of Texas Eastern, the impact was largely second-hand, through United Gas Pipe Line Company, Texas Eastern's principal supplier. In such a case, producer increases and decreases had their effect on Texas Eastern in a purely arbitrary pattern, depending on the business decisions of United, rather than on the safeguards provided by the Natural Gas Act. Moreover, because United's rate cases involved not only purchased gas cost increases, but also a multitude of unresolved zoning and allocation issues as well, consumer protection under § 5(a) was no longer possible in the case of Texas Eastern, since the numerous large contingencies underlying its rates destroyed all yardsticks by which § 5(a) could be applied.

Under these circumstances, and to attempt to achieve some price stability in a very unstable price situation, many pipelines and their customers would, from time to time, reach settlement agreements which amounted in effect to a compromise of purchased gas cost increases to that point and provided a temporary basis for stability until the spiral of field price inflation again disrupted the compromise plateau.

3. *Third Phase: Period of Relative Field Price Stability and Clearing of § 4(e) Pipeline Backlog.* Beginning, perhaps, with the second *Phillips* decision (Opinion 338, 24

F. P. C. 537 (1960)), *CATCO* [7] and the *UGI* series of cases [8] and taking still clearer direction with the major company-wide independent producer settlements and South Louisiana initial price settlements in 1961-63, a new phase of stabilized prices and increasing effectiveness of producer price regulation came into being (R. 76-77). As a result of this halt in the upward trend of field prices, the "pancaking" of unresolvable pipeline rate increases also went into a new phase. For example, United Gas Pipe Line filed a substantial rate increase at Docket No. RP63-1 on July 31, 1962 (its eighth successive filing in as many years). However, by the time it was placed in effect subject to refund on January 1, 1963, substantial reductions in the cost of gas purchased by United from producers had reduced the amount of the filed increase from some $5.6 million to only $1.6 million. *United Gas Pipe Line Co.*, 31 F. P. C. 1180, 1184 (1964). At the same time, the Commission had initiated new procedures for expediting pipeline rate cases and a hearing was actually held as to United's rates. By the close of the record, United's original increase had, as the result of further producer reductions, become a net *decrease* of almost $600,000 as of August 30, 1963. *Ibid.* Thus the Commission, almost for the first time in its regulatory history, was faced with the proper disposition of enormous refund amounts generated under § 4(e) in dockets involving a chain of three or more sales subject to its jurisdiction.

C. Specific Background of the Present Case.

1. *Texas Eastern Rate Settlement.* Because Texas Eastern came into existence at the end of the first phase discussed above, it has never been the subject of a Commission

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7. *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378.

8. *UGI v. FPC*, 283 F. 2d 817 (9th Cir. 1960); 287 F. 2d 159 (10th Cir. 1961); 290 F. 2d 133 (5th Cir. 1961); 290 F. 2d 147 (5th Cir. 1961).

rate order entered after full hearing, whether under Section 4(e) or Section 5 of the Act. Instead, its rates have been either those initially approved in its original certificate or those agreed to in settlements. Texas Eastern's first settlement, in rate increase docket No. G-1964, was litigated in *Texas Eastern Transmission Corp. v. FPC,* 306 F.2d 345 (5th Cir. 1962). Rate increases were subsequently filed by Texas Eastern in Docket Nos. G-12706 and G-18841. It was impossible to conduct a normal hearing under § 4(e) as to these rate increases in the manner done during the first phase of pipeline regulation discussed above, because of the fact that one of the principal cost items involved—the cost of purchased gas—was subject to contingency twice over. That is, the rates charged to Texas Eastern by its principal supplier, United Gas Pipe Line, were contingent and subject to refund under United's various Section 4(e) filings and United's Section 4(e) filings, in turn, were based largely on producer rate increases or high, out-of-line initial prices which were themselves contingent and subject to refund (R. 74-77). This situation was an unexpected and unfortunate by-product of the problems of producer regulation and delay which have been before this Court a number of times during the past decade.

Therefore, the rate increases filed at Docket Nos. G-12706 and G-18841 were settled by all parties in an agreement which sought to consolidate and compromise purchased gas cost increases of the past. For this reason the settlement agreement attempted to take into account the potential resolution of the various contingent cost increases already filed for, which underlay Texas Eastern's rate increase and specifically provided for flow-through of rate reductions and refunds in existing dockets.

2. *Commission Attention to Refunds.* As the third phase of regulation described above proceeded, the change

in regulatory posture was marked by the generation of large refund amounts ordered by the Commission in various independent producer certificate and rate increase dockets. The proper disposition of these amounts—generated in a legal context of producer-consumer contest—presented a novel regulatory problem. Since the Natural Gas Act mandates the protection of the consumer from excessive rates, and the courts and the Commission had ordered independent producers to refund substantial amounts on the theory that such refunds would protect the consumer, the Commission undertook to study the question of whether the Act at the same time mandated that such consumer protective funds must be paid the shareholders of intermediate pipelines. Therefore, it began to order the refunding producer to hold the funds in question pending a Commission determination of whether the Act deprived the consumer of this protection. The first major order establishing this approach was entered in *Humble Oil & Refining Company,* 32 FPC 49 (July 8, 1964).

The orders most directly involved here are the one issued as part of the Commission's Opinion 428-A, 32 FPC 687 (1964), and the one superseding it as part of the Order settling all of United's rate increase dockets on December 23, 1964. 32 FPC 1515 (1964). In these orders the Commission required United to hold the refunds representing disallowed rate increases and reductions below earlier rate levels, pending determination by the Commission of whether the Act required their payment to Texas Eastern.

3. *The Present case.* The procedural history of the present case is adequately outlined in the Statement in Texas Eastern's petition; but of course these specific proceedings cannot be understood properly outside the regulatory context described above.

REASONS FOR DENYING THE WRIT.

The issues actually presented by this case are narrow, unique and non-recurring. They do not fall under any of the criteria articulated by this Court in its Rule 19 1(b) as justifying time-consuming consideration upon Writ of Certiorari.

1. The Present Case Is of Limited, Purely Administrative Significance and Has Been Fully Examined by the Commission and Court of Appeals.

As the history set forth in the Statement reveals, the present case does not involve one of the fundamental questions of jurisdiction or regulatory method under the Natural Gas Act, such as engaged this Court's attention in the *Phillips* case,[9] in *Catco*,[10] in the *Rayne Field* case[11] or in the *Area Rate* case.[12] Rather, it involves a one-time, unique exercise of the Commission's discretion in carrying out the administration of its clear regulatory duties under those cases. Once the extent of the Commission's jurisdiction over the price of producer sales had been made clear by this Court, together with the Commission's duty to scrutinize such prices carefully, the generation of the refunds here at issue was inevitable. Confronted with these refund amounts, the Commission had, as a practical matter, only three kinds of action open to it, two of which were clearly illegal under this Court's decisions:

(1) to countermand its previous (court-affirmed) Section 4 and 7 orders and allow the producer natural gas companies to retain the consumer-protective refund

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9. *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672.

10. *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378.

11. *United Gas Improvement Co. v. Continental Oil Co.*, 379 U. S. 958.

12. *Permiam Basin Area Rate Cases*, 390 U. S. 747.

amounts to which they had previously been found not to be entitled;

(2) to order the refund funds to be paid without further investigation to an intermediate pipeline, such as Texas Eastern, which, since it was otherwise solvent,[13] would necessarily receive the fund as a windfall to its stockholders; or

(3) to order the refunds to be flowed through to the limit of the Commission's jurisdiction, with reliance upon local regulatory authorities to order the final flow-through which would return the refunds to the pocket of the consumer.

The Commission chose the third course, announcing that it would be followed in all future cases. This decision was clearly the only one legally and equitably open to it.[14] Even Texas Eastern half concedes in its petition to this Court (p. 20) that the Commission was not precluded from adopting a reasonable general policy to deal with this new problem. The court below was clearly reflecting the tenor of this Court's rulings in this area when it held:

> "Our view is that the Commission was authorized to see to disposition of the refunds in question on the

13. Though offered full opportunity to do so below, Texas Eastern chose not to present any evidence on the issue of its solvency during the period at issue. Evidence introduced by the Staff confirmed its solvency.

14. Texas Eastern's narrow emphasis on the word "refund" alone in Section 4(e) is entirely misplaced. Even if its narrow reading of the word "refund" itself were conceded (and the reading is certainly not the only one possible), the Commission would still have discretion not to follow it where rigid adherence could lead to an absurd and inequitable result, as in the present case. The discretionary word "may" in Section 4(e) governs the word "refund" and embodies the broad Congressional intent. This clearly confers power in conjunction with Section 16 of the Act to deal equitably with disallowed rate increases by producers as the Commission has done here.

basis of the purpose of the Act to protect ultimate consumers of natural gas." (Texas Eastern Petition, p. 32)

Therefore, there really exists in the present case only the limited question of whether the Commission's treatment of Texas Eastern's individual case was fair. This is not an issue of general importance, either to administrative law generally, or the administration of the Natural Gas Act in particular. The Commission's approach was fair. It was fully and carefully examined by the Court below before its decision affirming the Commission and then thoroughly reexamined again upon rehearing, with the aid of two additional sets of briefs. There is no need for this Court to expend its time for the further examination of this *sui generis* issue, when the opinion of the court below is so thorough and correct and the only issue now at stake is the limited one of whether Texas Eastern stockholders in this particular instance shall or shall not enjoy a windfall of refund amounts at stake.

2. The Decision Below Is Not in Conflict With Any Decision of This Court or Another Court of Appeals.

In its petition, Texas Eastern attempts to show alleged conflict between the decision below and other decisions of this Court and various courts of appeals. Texas Eastern discusses both the issue of reparations (pp. 14-15) and the issue of the proper distribution of refunds (pp. 15-19). Understandably, Texas Eastern does *not* point out the internal contradiction latent in its own argument on these points.

This Court, in *FPC v. Interstate Natural Gas Co.*, 336 U. S. 577 (cited by Texas Eastern on the distribution issue), clearly points out:

> "[I]t is not ratemaking to determine the equity of the claim of the pipe-line companies [here Texas Eastern] to the fund." 336 U. S. at 582.

Thus the action of the Commission in this case was not rate making, either prospective or retroactive, and no issue of reparations is present here.[15]

Likewise, the Commission's decision below was in full harmony with the principles set forth in the *Interstate* case for correcting " 'that which has been wrongfully done by virtue of its process.' "[16] 336 U. S. at 582. It undertook to weigh all the legal and equitable factors bearing on a disposition of the fund that would best put all the parties in the position they would have been in had regulation of all the parties involved—producers and intermediate pipelines, as well as Texas Eastern—been instantaneous, instead of long delayed as it was. The Commission's action here was discretionary and has been affirmed by the court of appeals. Therefore, even if this Court might theoretically have reached a different result, had it been sitting as the Commission, the Commission's exercise of discretion clearly had a basis in reason. There is no need to re-evaluate that exercise on a Writ of Certiorari.

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15. "Reparations," of course, are the amounts ordered paid when a Commission (having that power) investigates the filed rates of a regulated company for a given past period, finds those rates to have been too high, fixes lower ones, and orders reparation of the difference. Here, no change has been ordered in any of Texas Eastern's past filed rates to its customers.

16. In *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U. S. 223, this Court said: "An agency, like a court, can undo what is wrongfully done by virtue of its order." 382 U. S. at 229.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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